Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1430

KURT R. STRAUBE, M.D.,

Petitioner,

v.

EMANUEL LUTHERAN CHARITY BOARD,
a corporation, dba EMANUEL HOSPITAL,

Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO

THE OREGON SUPREME COURT

November 21, 1979

Preston C. Hiefield, Jr.
Attorney at Law
775 Boise Cascade Building
Portland, OR 97201

Richard E. Alexander
Attorney at Law
900 S. W. Fifth 23rd Floor
Portland, OR 97204

Re: Straube vs. Emanuel Lutheran Charity Board SC 25276

Dear Counsel:

The Supreme Court on November 20, 1979, denied Appellant's Petition for Rehearing in the above-entitled matter.

Very truly yours,

/s/ Marilyn Hartley
Marilyn Hartley
Supreme Court Calendar Clerk

MH/vr
cc: William L. Hallmark

APPENDIX A

STATE OF OREGON

SUPREME COURT

KURT R. STRAUBE, M.D.,	)	
	)	JUDGMENT and
Appellant,	)	MANDATE
	)	
v.	)	Appeal from
	)	MULTNOMAH County
EMANUEL LUTHERAN CHARITY	)	Circuit Court
BOARD, a corporation, dba	)	
Emanuel Hospital,	)	No. 402 226
	)	
Respondent.	)	SC 25276

IT IS HEREBY ADJUDGED and ORDERED that the respondent's motion to dismiss the appeal filed June 3, 1977, from the order of May 13, 1977, is allowed.

This cause having come on to be heard on appeal and having been duly submitted and considered:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant costs and disbursements in this court taxed at $302.66.

The cause is returned below for further proceedings pursuant to law and the

opinion and order of the court entered September 18, 1979.

ISSUED at Salem, Oregon: Dec. 18, 1979.

STATE OF OREGON,)
County of Marion.)

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this Dec. 18, 1979.

LOREN D. HICKS
State Court Administrator

by_____
Deputy Administrator

No. 149—September 18, 1979

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc*

STRAUBE,
Appellant,
v.
EMANUEL LUTHERAN CHARITY BOARD,
Respondent.

(No. 402-226 SC 25276)

Appeal from Circuit Court, Multnomah County.

Clifford B. Olsen, Judge.

Argued and submitted February 6, 1979.

Richard E. Alexander, of Davies, Biggs, Strayer, Stoel & Boley, Portland, argued the cause for appellant. With him on the briefs was Preston C. Hiefield, Jr., of Williams, Stark, Hiefield, Norville & Griffin, P. C., Portland.

William L. Hallmark, Portland, argued the cause and filed a brief for respondent. With him on the brief were William A. Masters, and Jones, Lang, Klein, Wolf & Smith, Portland.

William P. Isele, Chicago, Illinois, filed a brief amicus curiae for the American Medical Association.

HOLMAN, J.

Affirmed.

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*TONGUE. J., did not participate in the decision of this case.

*BRYSON, J., retired April 1, 1979.

HOLMAN, J.

Plaintiff, a radiologist, brought this suit against defendant hospital for wrongful suspension of his staff privileges. He sought an order restoring them and enjoining the hospital from proceeding against him in the future unless it did so in compliance with due process and with its bylaws. Plaintiff also sought compensatory and punitive damages, attorney fees, and costs. Defendant moved for summary judgment which was partially granted on the due process issues. After trial on the remaining issues, the court concluded that defendant had complied with its bylaws and that there was a basis in fact for defendant's temporary and permanent suspensions of plaintiff's staff privileges. Plaintiff appealed from both the granting of the partial summary judgment and the final decree.[1]

It is not disputed that plaintiff is an excellent radiologist. Defendant suspended him for his inability to work with others at the hospital, an inability that assertedly interfered with adequate patient care. Plaintiff started working as a radiologist in 1963 at the Lloyd Center X-ray, a partnership that had an exclusive agreement with defendant to provide its radiology services. Plaintiff was temporarily suspended by the president of defendant. Pursuant to defendant's bylaws, plaintiff requested and got a hearing before the Medical Staff Executive Committee (executive committee) of defendant. The executive committee found that plaintiff was, in fact, a disruptive influence, and continued his suspension until a later date, when the executive committee would hear further evidence to see whether plaintiff had resolved his problems in his relationship with others; if so,

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[1] Plaintiff also instituted an action against four individuals, claiming they tortiously interferred with his business relationship with defendant hospital. He also lost that case at the trial level and appealed. The appeal in that case was argued at the same time as the appeal in this case. *See Straube v. Larson*, ___ Or ___, ___ P2d ___ (1979), decided this day.

defendant would restore plaintiff's privileges on a probationary basis.

Plaintiff appealed this decision to the Review Committee (review committee) as provided by the bylaws. That committee conducted another hearing and found that although plaintiff's behavior had perhaps been disruptive, it was not so disruptive as to harm the patients. Therefore, it recommended that plaintiff be reinstated for a one-year probationary period.

Pursuant to the bylaws, the review committee reported its conclusions back to the executive committee which rejected the review committee's conclusions and reaffirmed plaintiff's suspension. The executive committee asked plaintiff to appear before it within 30 days to offer testimony to show that he intended to work harmoniously. If he did so, it would reinstate him on a probationary basis. They warned him that if he did not so respond he would be permanently suspended.

Plaintiff did not respond and was permanently suspended. He appealed his suspension to the hospital Board of Directors (board). It concluded that plaintiff's disruptive behavior impaired the function of the radiology department which, in turn, was "inconsistent with the best interest of patients' care." It therefore affirmed the permanent suspension. Thereafter, a joint conference committee of the hospital voted unanimously to approve the board's action. The board reaffirmed its position in a subsequent meeting. Three months later plaintiff filed this suit.

Plaintiff's due process argument is:

> "The actions of private, non-profit hospitals are so effected [sic] and intertwined with the public nature of a hospital that such hospital must afford physicians some element of due process of law."

He identifies the following sources of this due process right: common law, Article 1, section 10, of the Oregon Constitution, and the Fourteenth Amendment of the

United States Constitution,[2] each of which will be considered in turn.

The term "common law due process" is unfortunate because of the tendency to confuse it with Fourteenth Amendment due process; "fair procedure" is a better term. In those states which recognize it, it is a rule having both substantive and procedural aspects which controls the actions of some private entities.[3] In *Pinsker v. Pacific Coast Soc. of Orthodontists,* 1 Cal 3d 160, 81 Cal Rptr 623, 460 P2d 495 (1969), for example, California adopted a common law requirement of "fair procedure" for private orthodontic associations, even though membership in such organizations was not necessary to practice orthodontics, because membership in the associations was "a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty." 460 P2d at 499. The follow-up case, *Pinsker v. Pacific Coast Soc. of Orthodontists,* 12 Cal 3d 541, 116 Cal Rptr 245, 526 P2d 253 (1974), holds that arbitrary conduct by an organization such as the Society of Orthodontists is forbidden by the common law, and that "an organization's decision to expel or exclude an individual may be arbitrary either because the reason underlying the rejection is irrational or because the organization has proceeded in an unfair manner." 526 P2d at 259.

Plaintiff contends there is a duty of fair procedure placed upon defendant in suspending his hospital privileges because those privileges are very important to plaintiff in pursuing his career and that the trial

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[2] Plaintiff makes the common error of asserting that all these "due process" provisions are violated at once, whereas, in fact, if the common law gives him the rights he seeks, the constitutions are not violated, and if the state constitution gives him those rights, the federal constitution is not violated. *See* Linde, *Without "Due Process"—Unconstitutional Law in Oregon,* 49 Or L Rev 125, 133-35 (1970).

[3] *E.g., Ascherman v. San Francisco Medical Society,* 39 Cal App 3d 623, 114 Cal Rptr 681 (1974); *Falcone v. Middlesex Co. Medical Soc.,* 34 NJ 582, 170 A2d 791 (1961).

court erred in granting the partial summary judgment. He states that the cases which recognize such a right require "a hearing, timely notification sufficiently prior to the hearing to allow adequate preparation of defense, a written statement of the charges against the individual, and the right to call his own witnesses before the committee." This court has never decided whether there is such a duty in Oregon, and it is unnecessary to do so in this case because, if such duty exists, it was complied with in this case. *Compare Huffaker v. Bailey,* 273 Or 273, 540 P2d 1398 (1975).[4]

Plaintiff points out all sorts of procedural shortcomings in the hearings he was afforded by the hospital staff which would be more appropriate had they been addressed to a court proceeding. This was a proceeding conducted by non-legally trained persons and there is no necessity that it be conducted with the preciseness of a trial at law or equity in order to be procedurally fair. The executive committee hearing the matter was composed of approximately 20 physicians, many of whom chose to question witnesses despite the presence of attorneys representing both plaintiff and the hospital. Plaintiff contends he was not permitted to show bias and prejudice of witnesses. In fact he was allowed the usual means, which is cross-examination. He contends he was not given a concise statement of the charges against him. He was given information of specific circumstances that occurred in connection

[4] Subsequent to the proceedings before the hospital committees and boards, the legislature enacted ORS 441.055(3)(c), which provides:

"(3) The governing body of each health care facility shall be responsible for the operation of the facility, the selection of the medical staff and the quality of care rendered in the facility. The governing body shall:

"* * * * *.

"(c) Insure that procedures for granting, restricting and terminating privileges exist and that such procedures are regularly reviewed to assure their conformity to applicable law * * *."

Or Laws 1977, ch 448, § 10, and ch 751, § 23a.

with the making of particular hospital records from which records he could have determined all necessary information. He secured as much or more information about the charges than he would have received from the average criminal indictment. He made no request for the relevant hospital records but proceeded to hearing.

Plaintiff contends he did not have an opportunity to call witnesses because defendant did not require the attendance of the witnesses he wished to examine. Defendant did not have subpoena power and, of course, could not require anyone's attendance. There is evidence that persons whom plaintiff requested to appear asked representatives of defendant whether they had to appear and were told, truthfully, they did not have to; but there is no evidence that defendant discouraged or dissuaded anyone who was so inclined from appearing and testifying. In fact, some persons did appear and testify in plaintiff's behalf.

Plaintiff complains that the committees before which the hearings were held were not impartial and that they considered information outside of the record. There was testimony that when the approximately 20-person executive committee deliberated after the hearings, as is usual with a jury, some things were discussed which were not relevant to the record and to the problem at hand. This situation was aggravated in that the difficulty between plaintiff and the other staff physicians and employees was of long standing and that many of the members of the committees and boards which sat in judgment were aware that things in the particular department in which plaintiff worked had not been all sweetness and light. However, we agree with the trial judge that plaintiff did not carry the burden of proving that the members prejudged the charges against him or that the proceeding was basically unfair.

Plaintiff charges that the bylaws and regulations for summary suspension were vague and overbroad

and were not followed. "Vagueness" is a fatal fault specifically in criminal law. *Compare State v. Hodges*, 254 Or 21, 457 P2d 491 (1969) *with Anderson v. Peden*, 284 Or 313, 324, 587 P2d 59 (1978). It is our conclusion that the bylaws were substantially complied with and that the standard, "in the best interests of patient care," is as definite as was practical. In *Huffaker v. Bailey, supra*, 273 Or at 276-77, we held that "a high quality of medical care" was not impermissibly vague.

Plaintiff contends that he was given no opportunity by the bylaws or in fact to be heard in advance of the summary suspension order. It is true the bylaws do not provide for any such hearing nor was he given one. Assuming that plaintiff is entitled to "fair procedure" under a common law theory, we cannot say that he is entitled to a pre-suspension hearing when the best interest of the patients may indicate to the contrary. In addition, the extent of the hearings to which he was entitled in order to receive fair treatment is related to that which he could reasonably expect when he entered into his relationship with the hospital. Fair procedure in a common law sense is not constitutional due process. When plaintiff joined defendant's medical staff he signified "his agreement to abide by these [the hospital's] bylaws and regulations" and they provided for immediate suspension if required by "the best interests of patient care in the hospital."

Plaintiff cites Article I, section 10, of the Oregon Constitution. It states:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Of course, if defendant's discharge of plaintiff did him a legal injury in his property, as he asserts, the proceedings in the trial court and in this court are precisely the remedy by due course of law to which the section entitles him. The question is not whether the

courts will afford him a remedy but whether defendant did him an injury under the law. In any event, Article I, section 10, itself does not direct the *defendant* to give him a remedy by due course of law. The section does not address a directive to private parties.

Plaintiff claims that the hospital is suffiently involved with the state to owe him "due process of law" under the Fourteenth Amendment of the United States Constitution.[5] He argues that "state action" is involved here because of "federal funding, charitable solicitation from the general public, federal tax exempt status, and vital service to the general public." However, he cites no authority that this is sufficient to constitute state action for the purpose of constitutional due process. In *Jackson v. Metropolitan Edison Co.*, 419 US 345, 95 S Ct 449, 42 L Ed 2d 477 (1974), the Court held that the action of a public utility in terminating service to a customer was not state action despite its regulation and its performance of an essential public service in which it possessed at least a partial monopoly. The action was not taken in the exercise of a power "which is traditionally associated with sovereignity." The performance of hospital services is not usually so associated.

For his next assignment of error plaintiff contends the trial court erred "in refusing to grant plaintiff a *de novo* review of the decision suspending plaintiff's staff privileges." Defendant contends that plaintiff is not entitled to judicial review at all. We have assumed (but not decided) for the purpose of this case that plaintiff is entitled to "fair procedure" as a common law right. This could only be assured of by some sort of court review.

The bylaws in this case say nothing about judicial review *per se*. They do, however, provide for review by

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5 "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

various hospital committees to be conducted as follows:

> "The representative of the Board of Directors or Executive Committee shall have the obligation to introduce evidence in support of its action or recommendations, but the applicant or member of the medical staff for whom the hearing has been convened shall thereafter be required to bear the burden of proving that the action or recommendation in question was arbitrary or unreasonable."

There is nothing about the statute, the bylaws, or common sense which indicates that a court at either the trial or appellate level should decide the merits of plaintiff's dismissal. It would be unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care. Courts are not knowledgeable about hospital operations or patient care. The bylaws to which plaintiff agreed when he accepted staff privileges provide for the decision to be made by persons with training in those fields, and there is no reason for upsetting their decision so long as there was a rationale therefor. *Compare Huffaker v. Bailey, supra* at 280-81 (applying a "good faith and adequate factual basis" scope of review in a case where a hospital denied a doctor's application for admission to the staff).

Plaintiff's next assignment of error contends that there was no evidence upon which the trial court could find that the hospital acted for cause and in good faith. We disagree. A physician's inability to work with others which jeopardizes patient care is good cause for terminating his staff privileges. *Compare Huffaker v. Bailey, supra,* 273 Or at 277-79, which holds that a physician's application for staff admission may be denied for inability to work with others. The facts show an adequate basis for defendant to conclude that plaintiff *was* unable to work with others and that this inability *did* jeopardize patient care. Nothing is to be

gained by reciting the voluminous evidence upon the subject.

Plaintiff charges as error the trial court's finding that defendant followed its bylaws in connection with the summary and permanent suspension of plaintiff's staff privileges. In this regard plaintiff alleges a failure (1) to notify him in concise language of the grounds for the Executive Committee action; (2) to provide him with a review committee whose members did not actively participate at the Executive Committee level; (3) to provide him with a reasonable opportunity to be heard and to present evidence; and (4) to provide him the right to call, examine and cross-examine witnesses. With the exception of No. (2) above these are the same kind of deficiencies in procedure which he claimed deprived him of "fair procedure" as a common law right and which we discussed in deciding that issue. Since we have already determined that defendant did meet these procedural requirements, it is unnecessary to discuss further this assignment of error. With regard to the claim that plaintiff was not provided with a review committee whose members did not actively participate at the executive committee level,plaintiff admits that the review committee did not include any person who sat on both committees. However, he objects to the review committee's reviewing the transcript of the executive committee as well as to its taking testimony. It would seem reasonable that such should be the functions of a review committee, and plaintiff points to nothing in the bylaws which indicates they should not.

The decree of the trial court is affirmed.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D.,	)	
	)	
Plaintiff,	)	No. 402-226
	)	
vs.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF
ROGER LARSON, EMANUEL	)	LAW AND DECREE
LUTHERAN CHARITY BOARD, a	)	
Corporation, dba EMANUEL	)	
HOSPITAL,	)	
	)	
Defendants	)	

Defendant Roger Larson's Demurrer having been argued, and sustained, and the plaintiff having not plead further, and

Defendant Emanuel Lutheran Charity Board, a corporation, dba Emanuel Hospital, having moved for summary judgment and, in the alternative, partial summary judgment, and

The remainder of the above entitled cause having come on regularly for trial before the above entitled Court on the 21st day of April, 1977, plaintiff appearing in person and by his attorneys Preston C. Hiefield, Jr., and Charles

Paulson, defendant appearing by its attorneys Robert P. Jones, Robert M. Keating and John F. Folliard, Jr., testimony and exhibits on behalf of the parties having been received in evidence, the Court having heard and considered the testimony and having examined and considered the exhibits and having heard and considered arguments on behalf of the parties, and having filed a Memorandum Opinion, and

The Court now being fully advised, hereby makes the following Orders, Findings of Fact and Conclusions of Law and Decree:

ORDERS

I.

The Court's judgment order on Demurrer, signed May 12, 1977, and entered May 13, 1977, marked Exhibit "A", attached hereto and by this reference made a part hereof is restated in its entirety and for the purposes of any appeal is deemed entered as of the date hereof.

The Court's order of partial summary judgment, signed March 29, 1977, and entered March 30, 1977, marked Exhibit "B", attached hereto and by this reference made a part hereof is restated in its entirety and for the purposes of any appeal is deemed entered as of the date hereof.

FINDINGS OF FACT

I.

The Court's written Opinion dated May 6, 1977, marked as Exhibit "C", is fully incorporated herein by reference as Findings of Fact.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Plaintiff failed to prove the material allegations of his Complaint.

2. The summary suspension was authorized by the Hospital by-laws taken in good faith and with cause.

3. The Hospital hearings and procedures relating to the suspension did not violate Hospital by-laws.

4. To date Plaintiff has suffered no monetary damages.

Based on the foregoing Orders, Findings of Fact and Conclusions of Law, the Court hereby makes and enters the following:

DECREE

NOW, THEREFORE, IT IS HEREBY ORDERED and DECREED that Plaintiff take nothing by his Complaint and that it be dismissed and that Defendant have, take and recover judgment against the Plaintiff its costs incurred herein taxed in the sum of $_____.

DATED this 3rd day of June, 1977.

/s/ Clifford B Olsen
CLIFFORD B. OLSEN
CIRCUIT JUDGE

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D., Plaintiff,	)	No. 402-226
v.	)	JUDGMENT ORDER ON DEMURRER FOR DEFENDANT ROGER G. LARSON
EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL, Defendant.	)	

This Court, having previously entened an order sustaining the Demurrer of Defendant Roger G. Larson, and Plaintiff not having pleaded further, it is hereby

ORDERED AND ADJUDGED that Defendant Roger G. Larson shall have judgment against Plaintiff for his costs as hereinafter taxed and that Plaintiff's Complaint be dismissed and Plaintiff shall take nothing thereby.

DATED this 12 day of May, 1977.

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D., Plaintiff,	No. 402-226
v.	ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL, Defendant.	

Motion of defendant Emanuel Hospital for full and/or partial summary judgment having come on for argument, plaintiff appearing by Richard Alexander and Preston C. Hiefield, Jr. of his attorneys, and defendant appearing by Robert M. Keating of its attorneys, the Court reviewed the pleadings and memoranda filed herein and the affidvits, depositions, and exhibits submitted in support of and in opposition to the motion, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that Part I of the motion for

full summary judgment is denied, and Subparagraphs (2) and (3) of Paragraph II are denied. Subparagraphs (1) and (4) are allowed and,

IT IS HEREBY ORDERED AND ADJUDGED that defendant have partial summary judgment in its favor as to the allegations of Paragraph VII, Subparagraph a. and b. of plaintiff's Third Amended Suit, and,

IT IS FURTHER ADJUDGED that should plaintiff obtain judgment in his favor, he is not entitled to punitive damages.

DATED this 7 day of March, 1977.

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE,

Plaintiff,

v.

EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL,

Defendant.

No. 402-226

OPINION

STATEMENT OF FACTS

Plaintiff is a radiologist. For a number of years he was a member of Lloyd Center X-Ray, a group of radiologists who provided all x-ray services for Emanuel Hospital. Because most of plaintiff's efforts for the partnership related to hospital based activities he had staff privileges at Emanuel.

On January 30, 1973, the president of defendant hospital, Roger Larson, temporarily suspended plaintiff's staff privileges. The letter advising plaintiff of the president's action recited in part: ". . . your recent

actions have become so disruptive within the radiology department that we are having severe difficulties in maintaining technical staff to continue effective operation of the department; thus, in my opinion, this suspension is necessary in the best interests of patient care at Emanuel Hospital." (Ex. 11)

Plaintiff requested a hearing before the Staff Executive Committee. On February 19 and 20, 1973, a hearing was held. The majority of the committee found:

"The testimony presented has demonstrated that he (Dr. Straube) has been a disruptive influence on the function of and the harmony within the radiology department.

"It is the opinion of the Executive Committee . . . that certain personality traits of Dr. Straube have contributed substantially to the current conflicts."

The Committee concluded:

1. Plaintiff's temporary suspension should be continued.

2. On July 21, 1973, the Committee would hear further testimony to ascertain whether or not plaintiff had resolved his "personality problems".

3. In the event of such resolution plaintiff's privileges would be restored upon a probationary basis effective August 1, 1973. (Ex. 17)

Plaintiff was dissatisfied and appealed the Executive Committee decision. Pursuant to the provisions of the By-Laws, a Review Committee was convened and hearings were held before that body between June 14 and September 12, 1973. On October 17, 1973, the Review Committee rendered its decision and concluded:

1. The testimony "suggested" that Dr. Straube had "been a disruptive influence on the function of and the harmony within the radiology department . . ."

2. The plaintiff's disruptive influence was not of "sufficient degree to result in harm to the patient(s)."

3. Plaintiff's "personality traits . . . have contributed substantially to the current conflicts."

4. The evidence was not sufficient to warrant summary suspension and

5. Plaintiff should be reinstated for a "one-year probationary period." (Ex. 25)

The conclusions of the Review Committed were reported to the Executive Committee, which on November 1, 1973:

1. Reaffirmed its earlier position;

2. Requested that plaintiff appear before the Committee within 30 days, at which time it would consider testimony from the plaintiff that he intends to work in the radiology department harmoniously;

3. Assuming plaintiff's testimony was satisfactory, the Executive Committee recommended that Dr. Straube be reinstated upon a probationary basis; and

4. In the event plaintiff did not respond to its request, the Executive Committee recommended permanent suspension.

Dr. Straube rejected the proposals of the Executive Committee and appealed his resultant permanent suspension to the Board of Directors. (Ex. 26) On December 4, 1973, the Board heard the appeal and found:

1. Dr. Straube had been a disruptive influence in the radiology department;

2. That the plaintiff's personality traits had contributed substantially to the conflicts and disharmony within the department;

3. That the department cannot function efficiently or satisfactorily with Dr. Straube on the staff; and

4. That the disruption and conflict which were determined to exist were "inconsistent with the best interest of patient care." (Ex. 9c)

The Joint Conference Committee received the action of the Board on

December 19, 1973, and voted unanimously to approve the Board decision. The Board then reaffirmed its decision of December 4, 1973, at its next meeting, which was held in January 1974. (Exs. 9c and 9e)

On April 19, 1974, plaintiff filed this suit for reinstatement, injunctive relief and damages.

CONTENTIONS OF PLAINTIFF

Plaintiff's contentions are embodied in Paragraph VII of his third amended complaint. He contends:

1. Denial of due process (Paragraph VII a and b);

2. Failure of the defendant to comply with its own by-laws (VII c); and

3. No basis in fact existed to warrant suspension of plaintiff's staff privileges (Paragraph VII d).

On March 30, 1977, this Court entered an order for partial summary judgment in respect to plaintiff's first contention and this suit was heard upon the remaining two claims.

FINDINGS

Generally the Court finds that the defendant did follow and comply with the Emanuel Hospital Staff By-Laws in respect to the actions it took in respect to the plaintiff. Further, the Court is of the opinion that there was a basis in fact for defendant's decision to first temporarily suspend and finally terminate plaintiff's staff privileges. These general conclusions are predicated upon the following specific findings:

COMPLIANCE WITH THE BY-LAWS

Plaintiff urges that defendant failed to comply with the staff by-laws in four particulars which will be considered in order.

First, it is claimed that defendant did not notify plaintiff in concise language the grounds of the Executive Committee action. (Ex. 6) Art. V, Section 1(c), provides in part and in effect upon receipt of a request for hearing before the Review Committee the secretary-treasurer of the

Executive Committee will "notify the applicant . . . in concise language the grounds for the action (of the Executive Committee)".

On May 2, 1973, plaintiff was advised by registered mail of the time, place, date, and in concise language, the "charges" which were brought before the Executive Committee and to be reviewed by the Review Committee. Plaintiff objected that "charges" were distinct from "grounds". When the matter was not resolved between the parties and their attorneys, plaintiff went to court and obtained an order directing defendant to advise him of the "grounds" for the Executive Committee action. Thereafter, plaintiff was provided with a list of the "five grounds" for the action. The "grounds" were identical to the "charges" about which plaintiff was advised on May 2. (Exs. 20, 1 thru u)

Assuming that plaintiff was not initially advised of the "grounds" he was properly apprised of the "grounds" well

before the first hearing at the Review level on June 14, 1973.

Secondly, plaintiff charges defendant did not select a Review Committee whose members did not participate at the Executive Committee level. The record established that the five members of the Review Committee were: (1) selected by the Executive Committee; (2) none of the Review Committee members were either members of or witnesses before the Executive Comm. ctee. It is difficult, therefore, to appreciate this contention.

Upon argument counsel for plaintiff suggested that in effect the Review Committee participated in the Executive Committee proceeding because each member had before the June 14 hearing read the transcripts of the Executive Committee proceedings. The Court does not equate reading the record of a proceeding with participation in that proceeding.

Also it must be remembered that the Review Committee was charged with the responsibility of determining whether or not the Executive Committee's action or recommendation was arbitrary or unreasonable. Such a determination could only be made after a review of the evidence upon which the action or recommendation was based. The contention that the Review Committee was improperly manned is without merit. (See Ex. 6, Art, IV, Section 1(D), Staff By-Laws).

Thirdly, plaintiff maintains he was not afforded a reasonable opportunity to be heard and to present documentary evidence. The Court has on two occasions read the entire record of proceedings before Executive and Review Committees. These records demonstrate that plaintiff was given whatever time he desired to be heard. His opportunity to present evidence was unfettered. This charge is without merit. (See Exs. 1 through 5).

Finally, plaintiff alleges defendant failed to provide him with the

right to call and examine witnesses, introduce exhibits and cross-examine witnesses. For the reasons expressed in regard to plaintiff's third contention, the Court finds no merit to the claim that he was not given the opportunity to introduce exhibits or cross-examine witnesses.

In respect to the remaining aspect of this allegation, i.e., he was not provided the right to call witnesses, plaintiff apparently maintains the defendant in some manner should have compelled certain staff members and hospital employees whom he enumerated to testify before the Review Committee. Of course, the defendant had in fact no legal right to compel any person to attend the hearing - it has no subpoena powers. A fair reading of Art. V, Section 2D, of the by-laws, (pertaining to members' right to call and examine witnesses) suggests the member may request any witness he desires to attend the hearing. In the event the witness is

in attendance, the member must be given the right to examine the witness. This subsection of the by-laws cannot be construed to mean the Committee has the obligation to produce any particular person or persons requested by the member. In the Court's view the Committee complied with the by-laws when the Committee permitted plaintiff to examine any witness he was able to voluntarily get to attend the proceeding.

A more serious question might exist if the defendant or the Review Committee actively discouraged witnesses plaintiff desired to call from attending the hearings. The record, however, does not establish that this occurred.

Plaintiff wrote nineteen individuals and requested their attendance before the Review Committee. Apparently some of these individuals inquired of defendant's attorney if they had to attend. They were told that they did not, but that they were free to do so if they wished. No one was discouraged

or urged not to accede to plaintiff's request.

It is worth noting that of the nineteen individuals plaintiff solicited, three did appear before the Committee. Eleven had testified before and had been cross-examined by plaintiff's attorney at the Executive Committee hearings. Of the remainder only one witness (Doris Kelly) was considered important enough to depose for the purposes of this trial. (Exs. 22a and b; Exs. 1-5). The Court concludes there is no merit to this allegation, but even if the claim is technically meritorious, the plaintiff did not suffer thereby.

NO BASIS IN FACT FOR THE SUSPENSION OF PLAINTIFF'S STAFF PRIVILEGES

It was the conclusion of the Executive Committee and the Review Committee that the evidence those bodies considered demonstrated that plaintiff had been a "disruptive influence" in the radiology department and that his "personality traits . . . have contributed

substantially to the current conflict". (Exs. 17 and 25). Neither body found any other basis for the action recommended. The first inquiry, therefore, must be whether or not a "disruptive influence" or a personality that "substantially contributes to conflict" within a hospital department is a basis for suspension or termination of staff privileges. A recent decision of the Oregon Supreme Court leads to the conclusion that the inquiry must be answered in the affirmative. In Huffaker v. Bailey, 273 Or. 273, 540 P2d 1398 (1975), on p. 278, the Court stated:

> "Most other courts have found that the factor of ability to work smoothly with others is reasonably related to the hospital's object of ensuring patient welfare. This conclusion seems justified for, in the modern hospital, staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, could severely hinder the effective treatment of patients."

The remaining inquiry, therefore, is whether in fact the evidence supports the conclusions that led to plaintiff's suspension.

It is frequently difficult to demonstrate the cause of disruption and conflict because it so often consists of a pattern of behavior as opposed to isolated but dramatic events. The "case" against Dr. Straube falls into the former category.

Having read the transcripts, the Court sensed that the plaintiff was in fact disruptive and the cause of turmoil in the radiology department. The following incidents, while not inclusive, are typical of the actions of the plaintiff which compelled the conclusions last expressed.(1)

Fred Warren, chief technician in the radiology department, on one occasion thanked a technician on behalf of "Dr. Haugen (chief of the raiology department) and myself" for their good work. Dr. Straub took umbrage with

Warren because his (Straube's) thanks were not also included (Ex. 1, p. 74).

Warren suggested to plaintiff he might approach Dr. Haugen and inquire what he (Dr. Straube) might do to help the department accomplish its goals and objectives. Dr. Straube replied it was against his moral and ethical character to do that (Ex. 1, p. 103).

Ardis Clark, a supervisor of the outpatient department, testified that plaintiff was late in her department two out of five days per week. His lateness varied from one-half hour to two hours. Dr. Straube was the only doctor who was late without explanation or making arrangements for cover (Ex. 1, pp. 123-125).

On another occasion Mrs. Clark complained about Dr. Straube's tardiness and he told her "the patient doesn't come first; Dr. Straube comes first". (Ex. 1, p. 127).

Jeanne Shanander, assistant coordinator, special procedures department,

reported that Dr. Straube left a patient on the x-ray table for an hour while he closeted himself with another doctor. After many requests for his presence, Mrs. Shanander was requested to find a resident to complete the procedure (pp. 136, 137).

On another occasion Dr. Straube delayed a procedure when he went for coffee. When the treating doctor showed up inquiring after the patient, Dr. Straube suggested the delay was the fault of Mrs. Shanander because she had not obtained a film he had ordered. The witness testified that in fact Dr. Straube had not ordered such film (p. 140). This witness had entertained resignation because of the "hassle" with Dr. Straube in the department. She attributed tension and disorganization in the department to Dr. Straube and reported that "the department runs more smoothly when Dr. Straube isn't there" (pp. 143-145).

Del Velenchenko, special procedures supervisor, related that Dr. Straube was frequently late for procedures without advising the staff. This, he related, tied up the procedure room to the detriment of the patient and others wanting the room (Ex. 1, p. 154).

He also described plaintiff's practice of scheduling "dummy arteriograms" which precluded scheduling viable procedures (p. 154). This witness related an instance when plaintiff delayed a procedure so another doctor "could not use his room" (p. 159).

On January 29, 1973, plaintiff caled Velenchenko at his home after Dr. Straube had learned that the witness had documented several instances of his lateness. The conversation of his which was taped by Dr. Straube and overheard by Dr. Banks was a forty-minute tirade (Ex. 75, Ex. 1, p. 163). The following day plaintiff ordered Velenchenko into a view room, turned off all the lights but one

view box because "I want to see the expression on your face when I talk to you." Plaintiff then inquired further about the practice of documenting plaintiff's tardiness.

Dr. Seapy, a resident in the radiology department, related an instance when plaintiff, to the witness's humiliation, directed the surgical nurse to assist with a special procedure while Seapy acted as circulating nurse (Ex. 1, p. 248).

On another occasion Dr. Seapy was examining a patient who was apparently unconscious. Dr. Straube came by and criticised Dr. Seapy for not recognizing that the patient was a "kook". When Dr. Seapy protested that he would rather lose his pride than not be careful, Dr. Straube told him "It's not a matter of pride; it's a matter of stupidity." It then developed that Dr. Straube had been informed in advance that the patient was in fact a "kook".

In the fall of 1972 a letter was addressed to the Residency Program. The letter was apparently delivered to Dr. Burton. He held the letter for a period and then passed it on to Dr. Haugen. Dr. Haugen failed to act on the matter promptly with the result that two of the residents were late in submitting their applications for the Board examinations. Appropriately, the letter should have been brought to Dr. Straube as director of the residency, immediately. Instead of treating the matter as an internal problem, albeit serious, plaintiff used the incident as an opportunity to write an extremely critical letter about Dr. Haugen to Dr. Richard Hopkins, the president of the hosptial staff (Ex. 10a).

In December Dr. Haugen, as chief of radiology, changed the scheduling procedures in the department. This action precipitated another letter. This letter was sent special delivery to Dr. Haugen, the man with whom the

plaintiff associated daily at the hospital, at his home, with a copy to Dr. Hopkins. The letter concluded ". . . further threats and intimidation against me by you must not reoccur in the future, nor should you continue to display an attitude of arrogance and persistent refusal of cooperation" (Ex. 10b).

On January 30, 1973, the day the temporary suspension was issued twelve of the radiology technicians sought an audience with Mr. Larson to air their criticisms of Dr. Straube (Ex. 1, p. 23).

The foregoing incidents, while not separately significant, support the conclusions reached by the Executive Committee and the Review Committee that Dr. Straube was a "disruptive influence" and that his "personality traits" have contributed significantly to the current conflicts. Clearly there was a basis in fact for the suspension of plaintiff's staff privileges.(2)

OTHER ISSUES

For the reasons stated above the Court concludes that plaintiff has utterly failed to carry the burden upon the central issues and accordingly defendant should have a decree in its favor. While not essential to the resolution of the case, it is perhaps appropriate to comment on other issues.

TEMPORARY SUSPENSION

While the pleadings do not specifically frame the issue, it is clear plaintiff is offended by the fact that his privileges were temporarily suspended by the president of the defendant without a hearing. There may be a basis for his complaint. The Review Committee specifically found the summary suspension unwarranted. The problem in the x-ray department did not suddenly appear on January 30, 1972 - it had festered for years, and it is difficult to understand why plaintiff's privileges could not have been continued nineteen more days until the Executive Committee could have

considered the matter as a complaint rather than as an accomplished suspension which it could "continue, modify or terminate". See Ex. 6, Staff By-Laws, Art. IV.

As the Court concluded above, there was a basis for plaintiff's suspension, and the result may well have been the same. However, there is little question but that employment of the summary suspension engendered heat in an already agitated situation. In the Court's view the summary suspension, for all practical purposes, eliminated the possibility of a resolution of the difficulty. The result is that, for all time, Emanuel Hospital, its staff and its patients, have lost the services of a dedicated and exceedingly talented practioner.

On the other hand, the action taken by the president was authorized by the by-laws. It is equally clear, in the Court's view, that the action was taken

in good faith and surely not without cause.

DAMAGES

Plaintiff has continued to practice at Lloyd Center X-Ray. His income has not in fact suffered because he has lost the Emanuel Hospital affiliation. Plaintiff urges that when inflationary factors are considered, he has in fact lost income. The vagaries of private practice, however, make such a conclusion based upon one year's experience, inconclusive and unreliable.

Further, plaintiff is a recognized expert in his field, and has many friends and associates throughout the world who could, and undoubtedly would, assist him in making other hospital connections. The Court recognizes that plaintiff's suspension will have some adverse effect upon him. It is, however, doubtful that it will be as devastating as Dr. Straube suggests. At this point plaintiff has suffered no monetary damages. That he will

experience such loss in the future is illusory. Surely it has not been established by a preponderance of the evidence.

Mr. Jones will prepare a decree consistent with the foregoing. I suggest this opinion should suffice as "Findings" as requested by the plaintiff.

Dated this 6th day of May, 1977.

/s/ Clifford B. Olsen
CLIFFORD B. OLSEN
CIRCUIT JUDGE

(1) The Court recognizes that plaintiff denied that some of the incidents occurred and that in respect to others there was contrary evidence. Nevertheless, the Committees and the Board did have an evidentiary basis for their conclusions.

(2) Even the members of the Executive Committee who were opposed to the suspension of his privileges agreed Dr. Straube had been disruptive (Dr. Wiebe's testimony and Ex. 19c).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

KURT R. STRAUBE, M.D., Plaintiff,	No. 402-226
v.	ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba EMANUEL HOSPITAL, Defendant.	

Motion of defendant Emanuel Hospital for full and/or partial summary judgment having come on for argument, plaintiff appearing by Richard Alexander and Preston C. Hiefield, Jr. of his attorneys, and defendant appearing by Robert M. Keating of its attorneys, the Court reviewed the pleadings and memoranda filed herein and the affidavits, depositions, and exhibits submitted in support of and in opposition to the motion, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED AND ADJUDGED that Part 1 of the motion for

full summary judgment is denied, and Subparagraphs (2) and (3) of Paragraph II are denied. Subparagraphs (1) and (4) are allowed and,

IT IS HEREBY ORDERED AND ADJUDGED that defendant have partial summary judgment in its favor as to the allegations of Paragraph VII, Subparagraph a. and b. of plaintiff's Third Amended Suit, and,

IT IS FURTHER ADJUDGED that should plaintiff obtain judgment in his favor, he is not entitled to punitive damages.

DATED this 29 day of March, 1977.

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

CIRCUIT COURT OF OREGON
Fourth Judicial District
Portland, Oregon 97204
248-3247
March 23, 1977

Mr. Richard E. Alexander
Attorney at Law
Boise Cascade Building
Portland, Oregon 97201

Mr. Charles E. Paulson
Attorney at Law
Standard Plaza
Portland, Oregon 97204

Mr. John F. Folliard, Jr.
Attorney at Law
1 S. W. Columbia
Portland, Oregon 97201

Re: Straube vs Emanuel Lutheran Charity Board, dba Emanuel Hospital No. 402-226

Gentlemen:

This matter is before the Court on defendant's motion for a summary judgment and in the alternative for

a partial summary judgment. I have reviewed defendant's motion and plaintiff's memorandum in opposition thereto, and conclude that the motion for the summary judgment should be denied.

For the reasons previously stated in my letter dated November 18, 1975, I do not believe Emanuel Hospital is a public body or that its actions in respect to the plaintiff constitute state action. Therefore, the issues sought to be raised in Subparagraphs (a) and (b) of Paragraph VII, plaintiff's third amended complaint, do not raise viable issues. Accordingly, Paragraph II (1) of defendant's alternative motion for partial summary judgment is allowed.

The case of Pedah Company v. Hunt, 265 Or. 433, unequivocally expresses the present attitude of the Oregon Supreme Court in respect to punitive damages in equitable proceedings. Accordingly, plaintiff is not entitled to punitive damages in this

proceeding and Paragraph II (4) of defendant's motion for partial summary judgment is allowed.

As this case evolved the Court has proceeded upon the assumption that the relationship between staff physicians and hospitals are contractual in nature. Staff privileges are valuable and unique. I am of the opinion they should only be terminated in good faith upon "an adequate factual basis" established in accordance with procedures provided in the hospital by-laws. I am unable to determine from the record whether or not the decision to terminate Dr. Staube was predicated upon an actual factual basis arrived in accordance with the procedures contained in the defendant's by-laws. Accordingly, Paragraphs I, II and III of defendant's motion for partial summary judgment are denied.

Mr. Folliard will prepare an order consistent with the foregoing for the Court's signature.

Very truly yours,

/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

CBO:nt

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
Portland, Oregon 97204
248-3247
November 18, 1975

Mr. Richard E. Alexander
Attorney at Law
Boise Cascade Building
Portland, Oregon 97201

Mr. Robert M. Keating
Attorney at Law
Morgan Park Building
Portland, Oregon 97205

Re: Straube vs Larson et al. No. 402-226

Gentlemen:

I indicated to Mr. Alexander at the Rule 4.00 hearing last Wednesday that I am going to overrule the demurrer to plaintiff's complaint. I don't mean to suggest that the trial judge will be bound by my reasoning, but I thought that the record should reflect my thinking in this case.

I do not believe that Emanuel Hospital is a quasi-public body and surely Mr. Larson is not a public official. The actions of the hospital and/or Mr. Larson, therefore, do not constitute state action. Accordingly I do not believe the constitutional issues raised by plaintiff's complaint are viable.

On the other hand, I do find that a staff physician has a protectible interest in the enforcement of a hospital's by-laws. Probably the interest is a contract interest and protectible as any contract right. Because part of plaintiff's claim relates to the alleged failure of the defendant to comply with the hospital by-laws, I am of the opinion that the complaint states a cause of

action and the demurrer should accordingly be overruled.

Very truly yours,
/s/ Clifford B. Olsen
Clifford B. Olsen
Circuit Judge

CBO:nt
Encls.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff,	)	NO. 74-307
v.	)	OPINION
ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital, Defendants.	)	

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Attorney for Plaintiff

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Portland, Oregon 97205
Attorneys for Defendants

Appendix C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff,	)	No. 74-308
v.	)	OPINION
ROGER G. LARSON, JOHN C. ENGLISH, M.D., ROBERT SEAPY, M.D., RICHARD K. HELM, M.D., FIRST JOHN DOE, SECOND JOHN DOE, ETC. TO AND INCLUDING TWENTIETH JOHN DOE, FIRST JANE DOE, SECOND JANE DOE, ETC. TO AND INCLUDING TWENTIETH JANE DOE, FIRST DOE, M.D., SECOND DOE, M.D. TO AND INCLUDING FIFTIETH DOE, M.D., Defendants.	)	

Charles Paulson
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Attorney for Plaintiff

Robert P. Jones
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Of Attorneys for Defendants

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Attorneys for John C. English

Plaintiff, Kurt R. Straube, M.D., asserts that he was deprived of his Fourteenth Amendment rights by defendants, Emanuel Lutheran Charity Hospital Board and its president, Roger Larson.

Plaintiff, in a second Complaint, alleges that Larson and defendant-doctors, English, Seapy, and Helm, conspired to deprive him of equal protection under the law.

The defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. (Fed. R. Civ. P. 12(b)(1) and (b)(6).

Plaintiff, a radiologist, was a member of the staff of Emanuel Hospital. On February 22, 1973, Larson, the hospital president, temporarily suspended plaintiff's staff privileges. In January of

1974 Emanuel's executive board permanently suspended plaintiff from the staff. Plaintiff avers that his suspensions were neither preceded by a hearing nor justified. He contends that Larson and defendant-doctors conspired to effect his dismissal and destroy his professional reputation.

This is a civil rights action authorized under 42 U.S.C. §1983 and §1985. Jurisdiction is invoked pursuant to 28 U.S.C. §1343.

Plaintiff's initial hurdle is jurisdiction. He must show state involvement in the hospital's suspension of his staff privileges before federal law will apply. He contends that several factors establish "state action" by the defendants:

(1) Emanuel Hospital is impressed with a public responsibility.

(2) Emanuel receives substantial state and federal benefits, including funds under the Hill-Burton Act, 42 U.S.C. §200 et seq.

(3) Emanuel is permitted to issue tax-exempt bonds. He also asserts that Emanuel had a co-operation agreement with the City of Portland in Urban Renewal projects.

Emanuel is a private, non-profit hospital organized for charitable purposes. It is "only by sifting facts and weighing circumstances that the non-obvious involvement of the State can be attributed its true significance". Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

There is a split of authority as to whether the above factors clothe private hospitals with the requisite "state action". The cases cited by plaintiff fail to associate the claimed state involvement with the challenged activity. They fail to apply the nexus requirement set out by the Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the controlling decision in the area of private versus state action.

Moose Lodge involved an action by a guest of a member of a private club who was refused service because of his race. He contended that the grant of a liquor license by the state liquor authority implicated the state in actions by the club. The Court concluded that the regulatory scheme did not foster or encourage the club's racially discriminatory practices.

The Court limited the doctrine of state action by requiring a connection between the injury and the governmental presence.

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject "to State regulation in any degree whatsoever. Since State-furnished services

> include such necessities of life as electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the Civil Rights Cases, supra, and adhered to in subsequent decisions." Moose Lodge, 407 U.S. at 173.

Barret v. United States, _____ F. Supp. _____, S.D. N.Y. Docket No. 73 Civ. 1716 (1974), presents a thorough analysis of all the major cases cited by both sides. Barret involved facts similar to those alleged in plaintiff's Complaints. The Court applied the Moose Lodge requirement of a connection between governmental activity and a civil rights injury.

The Court also noted that the cases which subjected private institutions to the limitations of §1983 generally involved either racial discrimination or

activities which are traditionally the exclusive province of state or municipal governments. Barret rejected the notion that private hospitals carry on traditional government functions.

As noted in Moose Lodge, the Civil Rights Act is not intended to provide a general federal tort claims remedy. Plaintiff could conceivably find some degree of state involvement in virtually every major private institution existing today. Plaintiff's Complaints fail to allege the necessary nexus between governmental involvement with Emanuel Hospital and his suspension from staff privileges. Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

Plaintiff's second Complaint alleges a conspiracy in violation of 42 U.S.C. §1985. The Supreme Court in Griffin v. Breckinridge, 403 U.S. 88 (1971), held that before a cause of action exists under §1985 "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory

animus behind the conspirators' actions". Griffin at 102. Plaintiff has not alleged any class-based discrimination. His Complaint fails to satisfy the requirements of the statute. Jackson v. Norton Children's Hospital, 487 F.2d 502 (6th Cir. 1973); O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973).

Defendants' motions to dismiss are granted. A final order will be entered dismissing plaintiff's Complaints.

Dated this 7th day of October, 1974.

/s/ Otto R. Skopil, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KURT R. STRAUBE, M.D., Plaintiff,	)	CIVIL 74-307
v.	)	
ROGER G. LARSON and EMANUEL LUTHERAN CHARITY BOARD, a corporation, dba Emanuel Hospital, Defendants.	)	JUDGMENT

KURT R. STRAUBE, M.D., Plaintiff,	)	CIVIL 74-308
v.	)	
ROGER G. LARSON, JOHN C. ENGLISH, et al., Defendants.	)	JUDGMENT

Based upon the Opinion of the Court entered contemporaneously herewith,

IT IS ORDERED and ADJUDGED that defendants' motions to dismiss are granted, that plaintiff shall take nothing, and the cases are dismissed on the merits.

DATED this 8th day of October, 1974.

/s/ Robert M. Christ
ROBERT M. CHRIST,
CLERK OF COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KURT R. STRAUBE, M.D.,	)	
Appellant,	)	No. 74-3496
vs.	)	No. 74-3497
ROGER G. LARSON, et al.,	)	MEMORANDUM
Appellees.	)	

[March 18, 1976]

Appeal from the United States District Court
for the District of Oregon

Before: ELY and TRASK, Circuit Judges, and CHRISTENSEN, District Judge.*

---

*Honorable A. Sherman Christensen, Senior United States District Judge, Salt Lake City, Utah, sitting by designation.

Appendix D

Straube, a radiologist, was suspended from the staff of Emanuel Hospital, allegedly without a hearing or justification. The District Court dismissed his civil rights claims, brought under 42 U.S.C. § 1983, for lack of "state action". We affirm.

Emanuel Hospital is a private charitable institution receiving public funds and certain tax advantages. These facts alone are insufficient to establish the required state action. See Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975); Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975).

Straube contends that the hospital's connection with an urban renewal project of the City of Portland establishes the necessary state nexus. We disagree.

The key to a determination of state action is that the state must be significantly involved in the specific activity

of which complaint is made. Watkins, supra; Ascherman v. Presbyterian Hosp. of Pac. Med. Co., Inc., 507 F.2d 1103 (9th Cir. 1974); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974). Here there is no such allegation. That the hospital and the City are parties to an urban renewal project is an example of a state contact, but nothing indicates that Portland is involved in the hospital's decisions in respect to the hospital's personnel.

AFFIRMED.